STATE OF MICHIGAN

COURT OF APPEALS

LEE WILSON,

Plaintiff-Appellant,

v

LAKEPOINTE GAS AND OIL, INC. and IS REAL ESTATE, LLC,

Defendants-Appellees.

UNPUBLISHED
March 17, 2009

No. 281459
St. Clair Circuit Court
LC No. 06-002472

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

In this premise liability action, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under both MCR 2.116(C)(8) and (C)(10). We reverse in part, affirm in part, and remand to the trial court for further proceedings.

Plaintiff was injured when he slipped and fell on a patch of ice as he was walking into a service station to pay for gasoline. According to plaintiff's complaint, the parking lot appeared completely dry and there was no snow or salt in the parking lot. Plaintiff asserted that he fell on what is termed "black ice" that was not visible to him as he walked, and that the ice was present as a result of defendants' negligence. On defendants' motion for summary disposition, the trial court determined that the ice was open and obvious such that plaintiff could not recover from defendants for his injuries, and that the ice did not represent a public nuisance. The trial court thus granted defendants' motion and dismissed plaintiff's complaint. This appeal followed.

A trial court's decision to grant summary disposition is reviewed de novo. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "In deciding a motion pursuant to subrule (C)(10), the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Eason v Coggins Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). "All factual allegations in support of the claim are accepted as true, as well

as any reasonable inferences or conclusions that can be drawn from the facts." *Michigan Ins Repair Co, Inc v Manufacturers Nat'l Bank of Detroit*, 194 Mich App 668, 673; 487 NW2d 517 (1992).

On appeal, plaintiff first contends that the trial court erred in its determination that the black ice he slipped and fell on was open and obvious and that defendants therefore owed no duty to plaintiff to warn of or protect him from the same. We agree.

A premises possessor has the legal duty "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The premises possessor is generally not required, however, to protect invitees from open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A danger is open and obvious when an average person with ordinary intelligence would be able to discern the danger with only a casual inspection. *Richardson v Rockwood Ctr*, 275 Mich App 244, 247; 737 NW2d 801 (2007).

Recently, in *Slaughter v Blarney Oil Castle Co*, 281 Mich App 474; ___ NW2d ___ (2008), this Court clarified the applicability of the open and obvious doctrine with respect to black ice. After considering several dictionary definitions of black ice, *Slaughter* observed that "[t]he overriding principle behind the many definitions . . . is that [black ice] is either invisible or nearly invisible, transparent[] or nearly transparent." *Id.* at 479. Noting that these characteristics are "inherently inconsistent with the open and obvious doctrine," *Slaughter* declined to find that black ice is necessarily open and obvious. The Court instead indicated that to find black ice to be open and obvious, there must be some evidence that the black ice in question would have been visible on casual inspection prior to the fall or other indicia of a potentially hazardous condition. *Id.* Applying this requirement to the facts before it, the Court reasoned:

> With regard to whether other evidence of an open and obvious danger existed in this case, there was no snow on the ground, and it had not snowed in a week. Prior to alighting from her truck, plaintiff did not observe anyone else slip or hold onto an object to maintain his or her balance. She did not see the ice before she fell, and could not readily see it afterwards. Although it was starting to rain at the time of plaintiff's fall, the danger and risk presented by a wet surface is not the same as that presented by an icy surface. Contrary to defendant's assertion that the mere fact of it being wintertime in northern Michigan should be enough to render any weather-related situation open and obvious, reasonable Michigan winter residents know that each day can bring dramatically different weather conditions, ranging from blizzard conditions, to wet slush, to a dry, clear, and sunny day. As such, the circumstances and specific weather conditions present at the time of plaintiff's fall are relevant. We are not persuaded that the recent onset of rain wholly revealed the condition and its danger as a matter of law such that a warning would have served no purpose. [*Id.* at 460 (citation omitted).]

In the case at hand, plaintiff slipped and fell on black ice on a sunny mid-afternoon in late December. Before he fell, plaintiff testified, it was not snowing, there was no snow in the parking lot, and the parking lot "looked just like a perfectly dry parking lot." He was watching

where he was walking and did not see any ice on the ground. Plaintiff testified that after his fall, he attempted to discover what had caused it and noticed that "[t]he snow on the roof was melting, coming down into the eaves troughs and running over the eaves troughs out into the parking lot." According to plaintiff ice appeared to have formed where the water had run into the parking lot. He described the ice (again, observed only upon focused investigation after his fall) as being four to six feet wide where he fell, which was approximately eight feet away from the store sidewalk. The ice was not covered by snow and was "[t]he same color as the asphalt." He also stated that there was no salt in the area where he fell.

Plaintiff's deposition testimony establishes that snow on the convenience store roof was observable. However, plaintiff testified to seeing the snow melting into the eaves and then onto the pavement. A reasonable person seeing the melting snow in the case at hand might have been led to believe that the conditions were not conducive at that moment to the formation of ice. Further, a weather summary for Port Huron (approximately 10 miles from the gas station) on the day of the accident indicates that the temperature that day ranged between 19 to 33 degrees Fahrenheit. While there were temperature fluctuations on that date, the sunshine and the evidence of the melting snow would lead a reasonable person to believe that at the point in the day when plaintiff fell, the weather was in the midst of the melting portion of the melting-freezing cycle common in Michigan.

Plaintiff did state that after his fall he went back out to the parking lot and that "if you stare right at [the ice patch], you can see it." While, plaintiff may have been able to see the ice upon a focused, post-fall examination of the area, that is not the applicable standard. Under the circumstances present, a factual question exits "regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection" prior to the fall. *Slaughter, supra*. Accordingly, the trial court erred in granting summary disposition to defendants on the basis that the danger presented by the black ice was open and obvious

Because of our resolution of the applicability of the open and obvious doctrine, we need not address plaintiff's argument that special aspects existed that rendered the condition unreasonably dangerous. *Lugo, supra.* Neither do we need to address plaintiff's assertion that the trial court denied him his right of due process by finding that the black ice was open and obvious.[1]

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[1] We note, however, that plaintiff's argument is predicated on a faulty premise. The trial court did not determine that black ice is open and obvious; it determined that the danger posed here by the ice on which plaintiff slipped was open and obvious. *Slaughter* accepted that there could be situations where "the black ice in question would have been visible on casual inspection prior to the fall," or that there could exist "other indicia of a potentially hazardous condition" that would render the danger open and obvious. *Slaughter, supra* at slip op p 6. Here, the court noted that plaintiff testified that he could see the ice if he looked right at it. In *Kaseta*, Judge Whitbeck concluded that there were sufficient additional indicia of danger that the open and obvious doctrine applied. *Kaseta, supra*, unpublished opinion per curiam, p 2 (Whitbeck, J., dissenting). That we disagree with the trial court's decision on whether the danger was open and obvious does not mean that the court in essence "defin[ed] something as its opposite."

We reject, however, plaintiff's assertion that the court erred in dismissing his public nuisance claim.

> A public nuisance is an unreasonable interference with a common right enjoyed by the general public. The term "unreasonable inference" includes conduct that (1) significantly interferes with public health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).]

Here, the effect of the alleged interference (the ice) was not necessarily of a continuing nature and was not permanent or long lasting. Not only did plaintiff fail to indicate how long the condition had existed, once the snow on the roof was reduced or eliminated, the overflowing mechanism described by plaintiff would no longer be operating. Further, had the temperature risen to a sufficient level, the ice formed would have melted. Thus, plaintiff's public nuisance claim is insufficiently pleaded and summary disposition was proper under MCR 2.116(C)(8).

We reverse the trial court's order of summary disposition in defendants' favor on plaintiff's negligence claim, and affirm the summary dismissal of plaintiff's claim of public nuisance. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly